thereof, were false and misleading, and for the further reason that the article was labeled so as to deceive and mislead the purchaser, since it did not consist of pure honey, but was a product consisting in part of commercial invert sugar, and in certain shipments of the article, the jars contained less than the amount declared thereon. Misbranding was alleged for the further reason that the article was offered for sale under the distinctive name of another article, namely, pure honey.

The honey malt chocolate flavor was alleged to be adulterated in that a mixture of sugar, water, and cocoa slightly flavored with honey and malt, had been substituted for a chocolate-flavored mixture of honey and malt, which the article purported to be.

The honey malt chocolate flavor was alleged to be misbranded in that the statements, "Honey Malt Chocolate Flavor" and "Net Wt. 1 Lb.", were false and misleading since said statements represented, respectively, that said article was honey malt chocolate flavor and that the quantity of contents was 1 pound net; whereas it was not but was, in fact, another product, a mixture of sugar, water, and cocoa slightly flavored with honey and malt and the quantity of the contents was less than 1 pound net; in that said statements were borne on the jars so as to deceive and mislead the purchaser into the belief that said article was honey malt chocolate flavor; and in that said article was offered for sale under the distinctive name of another article, namely, honey malt chocolate flavor, which it purported to be.

On April 15, 1936, pleas of guilty were entered on behalf of the defendants and the court imposed a fine of $14 against the company and a fine of $590 against each defendant or a total fine against the defendants of $2,374.

W. R. GREGG, *Acting Secretary of Agriculture.*

25878. Misbranding of cottonseed pebble-sized cake and cottonseed meal. U. S. v. Feeders Supply & Manufacturing Co., a corporation. Tried to a jury. Verdict of guilty. Fine, $100 and costs. (F. & D. no. 36016. Sample nos. 33016-B, 33017-B.)

This case involved a shipment of cottonseed pebble-sized cake and cottonseed meal that contained a smaller amount of protein than declared on the label.

On October 21, 1935, the United States attorney for the Western District of Missouri, acting upon a report by the Secretary of Agriculture, filed in the district court an information against Feeders Supply & Manufacturing Co., a corporation, Kansas City, Mo., alleging that on or about June 8, 1935, the defendant company shipped from Kansas City, Mo., into the State of Kansas a quantity of cottonseed pebble-sized cake and cottonseed meal, and that it was misbranded in violation of the Food and Drugs Act. The article was labeled in part: "Equity Brand Cottonseed Cake and Meal 100 Pounds Net Guaranteed Analysis Protein not less than 43% * * * Manufactured For Feeders Supply and Mfg. Co. * * * Kansas City, Mo."

Misbranding was alleged for the reason that the statement "Protein Not Less than 43%", labeled on the sack tags, was false and misleading and for the further reason that the article was labeled so as to deceive and mislead the purchaser, since the article did not contain 43 percent of protein, but in fact contained less than 43 percent of protein.

On April 7, 1936, the case came on for trial before a jury when a verdict of guilty was returned. The court imposed a fine of $400 and costs. On May 9, 1936, the court overruled the defendant's motion for a new trial with the following opinion:

OTIS, *Judge:* The motion for a new trial in this case was taken under advisement only that consideration might be given to one of the several grounds stated in the motion—alleged error in a part of the court's charge to the jury in a connection presently to be stated.

The information was in two counts but it is necessary to refer only to one. Count I of the information charged the defendant with transporting in interstate commerce sacks of animal food (cottonseed pebble-size cake) each branded as follows: "100 pounds net—guaranteed analysis—protein not less than 43%, etc." It was further charged that the articles of food thus branded were misbranded in that their protein content was not more than 38.56 percent.

The evidence supported the charge. Possibly there was some evidence which would have supported a finding of fact that the protein content of the food articles referred to was as much as 42 percent (without a transcript of the testimony I cannot be definite as to that.)

In the charge to the jury, after setting out the several elements of the charge, it was said: "This offense is committed if all of the other elements as

I have stated them have been proved, if the actual protein content of the food products referred to in the evidence and in the information fell short of 43 percent by any fraction of a percent."

It is of this portion of the charge that the defendant complains, contending it was an erroneous statement of the law.

I am satisfied the charge correctly stated the law.

The statute upon which the information was based is the Food and Drugs Act. The pertinent sections of that act are as follows:

"SECTION 2. That the introduction into any State * * * from any other * * * of any article of food * * * which is * * * misbranded * * * is hereby prohibited * * *

"SECTION 9. The term "misbranded" as used in Sections 1 to 15 * * * shall apply to * * * articles of food * * * the label of which shall bear any statement * * * regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular.

"SECTION 10. For the purposes of Section 1 to 15 * * * an article shall be deemed to be misbranded. * * * "

In case of food: * * *

THIRD. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count; Provided, however, That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section 3 of this title * * *

FOURTH. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular."

Now there can be no real doubt that a violation of the Food and Drugs Act is established when it is proved that a package containing animal food is branded as: Guaranteed analysis, protein not less than 43 percent, if the protein content of the food is less than 43 percent. Certainly then the label does bear (a) statement * * * regarding the ingredients or substances contained (in the food) which statement * * * (is) false or misleading in (one) particular.

The contention of the defendant is that the statute upon which the information was based permits of some variation from the precise statement made on a label, some "tolerance." If the contention is sound the charge certainly was erroneous (although it would not follow that a motion for a new trial should be granted on that account).

I think the statute permits of no variation from the truth in the label on a package of food, however slight the variation may be. The reasons for this conclusion I state here briefly:

First, the statute makes no express provision for any "reasonable variation" or "tolerance" in connection with the fourth paragraph of Section 10, upon which the information in this case was based. The absence of such provision for reasonable variations and tolerance is especially significant that no such variation or tolerance should be allowed in view of the fact that in the paragraph immediately preceding (paragraph 3) of Section 10 there is an express proviso authorizing reasonable variations and tolerance in statements of weights.

Second, to read into paragraph 4 of Section 10 by implication a proviso for reasonable variations and tolerances with no provision of a standard for determinating the upper and lower limits of such variations and tolerances is to make the statute vague, indefinite, and unenforceable. No standard is provided by the statute and no official is authorized by the statute to establish one.

Third, no possible variation downward from such a representation as that with which we are dealing in the label involved here can be reasonable. The representation guarantees that the protein content is "not less than 43%." None can reasonably interpret the phrase "not less" as meaning possibly "only a little less."

No variation from the percentage of protein guaranteed on the label would be reasonable even if the phrase "not less" were not used. When the guarantee is that the protein content is 43%, necessarily it is implied that the protein content is not less than 43%. Certainly that is the idea intended to be conveyed by the writer of the label. It is as if he said upon the label itself in so many words, "I represent that the food stuff in this package contains not a fraction of one per cent less than 43% of protein."

Forty-three (unlike "40" or "30" or "20") is an odd number, an exact number, not a round number. One who gives expression to an idea by the use of a number, if he intends only approximation, certainly will not use such a number

as "43" or "57" or "79." Use of such numbers indicates an intention of expressing with mathematical exactness the idea to be conveyed. That would be still more apparent if the representation was: "The protein content of the food stuff in this package is 43.3%." None would say that such a representation really means "about 43.3%."

I think the charge to the jury correctly stated the law.

The motion for a new trial should be and is overruled. It is so ordered.

On May 14, 1936, the court entered an order reducing the fine to $100.

W. R. GREGG, *Acting Secretary of Agriculture.*

25879. Misbranding of cottonseed cake and meal. U. S. v. Temple Cotton Oil Co., a corporation. Plea of guilty. Fine, $25. (F. & D. no. 36043. Sample nos. 33018–B, 33019–B.)

This case involved shipments of cottonseed meal and cake that contained a smaller amount of protein than indicated on the label.

On December 2, 1935, the United States attorney for the Eastern District of Arkansas, acting upon a report by the Secretary of Agriculture, filed in the district court an information against the Temple Cotton Oil Co., a corporation, Little Rock, Ark., alleging that on or about June 11 and July 15, 1935, the said defendant had shipped from the State of Arkansas into the State of Kansas a number of sacks of cottonseed meal and cake, and that the article was misbranded in violation of the Food and Drugs Act. The article was labeled in part: "100 Pounds Net [design of Indian] Quapaw Brand Cottonseed Meal—Cake Guaranteed Analysis Protein 43.00% * * * Manufactured by Temple Cotton Oil Company, Little Rock, Ark."; "Equity Brand Cottonseed Cake & Meal * * * Guaranteed Analysis Protein not less than 43%."

Misbranding was alleged for the reason that the statement "Protein not less than 43%", on the sack tag, was false and misleading, and for the further reason that the article was labeled so as to deceive and mislead the purchaser, since the article did not contain 43 percent of protein, but did contain less than 43 percent thereof.

On February 10, 1936, a plea of guilty was entered on behalf of the defendant, and the court imposed a fine of $25.

W. R. GREGG, *Acting Secretary of Agriculture.*

25880. Adulteration of tomato puree. U. S. v. Riona Products Co., Inc. Plea of guilty. Fine, $50 and costs. (F. & D. no. 36052. Sample no. 30751–B.)

This case involved a shipment of tomato puree that contained excessive mold.

On December 12, 1935, the United States attorney for the Southern District of Texas, acting upon a report by the Secretary of Agriculture, filed in the district court an information against Riona Products Co., Inc., trading at McAllen, Tex., alleging that on or about June 13, 1935, the defendant had shipped from the State of Texas to San Juan, P. R., a number of cans of tomato puree, and that the article was adulterated in violation of the Food and Drugs Act. The article was labeled in part: "Valley Rose Brand Tomato Puree * * * Packed by Riona Products Co., Inc. McAllen, Texas."

The article was alleged to be adulterated in that it consisted in part of a decomposed vegetable substance.

On February 29, 1936, a plea of guilty was entered on behalf of the defendant, and the court imposed a fine of $50 and costs.

W. R. GREGG, *Acting Secretary of Agriculture.*

25881. Adulteration of canned tuna. U. S. v. Franco-Italian Packing Co., Inc. Plea of guilty. Fine, $75. (F. & D. no. 36068. Sample nos. 15878–B, 15881–B.)

This case involved interstate shipments of canned tuna that consisted in part of a decomposed animal substance.

On December 27, 1935, the United States attorney for the Southern District of California, acting upon a report by the Secretary of Agriculture, filed in the district court an information against the Franco-Italian Packing Co., Inc., having places of business at East San Pedro and Terminal Island, Calif., alleging that on or about May 31 and July 12, 1934, the defendant company sold and delivered a number of cans of tuna in cases to Haas, Baruch & Co., Inc., Los Angeles, Calif., under a guaranty that it complied with the Federal Food and Drugs Act, that the product was subsequently shipped on or about October 5,